UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. CRISTINA CHEN-OSTER; LISA PARISI; and SHANNA ORLICH, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

GOLDMAN, SACHS & CO. and THE GOLDMAN SACHS GROUP, INC.,

Defendants.

No. 10 Civ. 6950 (LBS) (JCF)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Outten & Golden LLP
Adam T. Klein
Cara E. Green
Jennifer L. Liu
Mariko Hirose
3 Park Avenue, 29th Floor
New York, NY 10016
Telephone: (212) 245-1000

Lieff, Cabraser, Heimann & Bernstein, LLP
Kelly M. Dermody (admitted *pro hac vice*)
Anne B. Shaver (admitted *pro hac vice*)
Heather H. Wong (admitted *pro hac vice*)
Alison M. Stocking (admitted *pro hac vice*)
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

Attorneys for Plaintiffs and the Putative Class

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. PROCEDURAL BACKGROUND 1

III. FACTUAL BACKGROUND 1

The Agreement 1

Requested Discovery 3

IV. ARGUMENT 3

A. The Discovery Plaintiffs Seek Is Necessary In Order To Undertake The Analysis Outlined By The Supreme Court In Stolt-Nielsen 4

B. The Agreement Is Ambiguous As To The Treatment Of Class Claims 6

C. New York Contract Law Allows For The Consideration Of Extrinsic Evidence In Interpreting A Contract 7

D. The Requested Discovery Is Necessary To Demonstrate The Knowledge, Custom, Expectations, And Traditions Of The Parties 9

E. The Production Of Documents Is Not Unduly Burdensome 12

V. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

67 Wall St. Co. v. Franklin Nat'l. Bank, 333 N.E.2d 184 (N.Y. 1975) 7

Alexander & Alexander Servs., Inc. v. Certain Underwriters at Lloyd's, 136 F.3d 82 (2d Cir. 1998) 8

Amochaev v. Citigroup Global Mkts., Inc., No. 05-Civ.-1298 (N.D. Cal. filed Mar. 31, 2005) 10

Augst-Johnson v. Morgan Stanley & Co., Inc., No. 06-Civ.-1142 (D.D.C. filed June 22, 2006) 10

Bazzle v. Green Tree Financial Corp., 539 U.S. 444 (2003) 10

Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963 (S.D.N.Y. 1996) 3, 9

Cardwell v. Thermo Fischer Scientific, No. 09 Civ. 7809 (DAB), 2010 WL 3825711 (S.D.N.Y. Sept. 23, 2010) 11

Chapman v. N.Y. State Div. for Youth, 546 F.3d 230 (2d Cir. 2008) 6

Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 96 Civ. 3773 (N.D. Ill. filed June 21, 1996) 10

E.E.O.C. v. Morgan Stanley & Co., No. 01-Civ.-8421 (S.D.N.Y. filed Sept. 10, 2001) 10

Fernandez v. Price, 880 N.Y.S.2d 169 (App. Div. 2009) 8

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 8

Galakhova v. Hooters of Am. Inc., Case No. 34-2010-00073111 (Cal. Super. Ct. July 27, 2010) 5, 6

Guardian Life Ins. Co. of Am., Inc. v. Schaefer, 519 N.E.2d 288 (N.Y. 1987) 7

Guzman v. N. Ill. Gas Co., No. 09-Civ.-1358, 2009 WL 3762202 (N.D. Ill. Nov. 6, 2009) 11

Hohider v. United Parcel Serv., Inc., 574 F.3d 169 (3d Cir. 2009) 11

In re Six Grand Jury Witnesses, 979 F.2d 939, 943 (2d Cir. 1992) 12

Investors Ins. Co. v. Dorinco Reins. Co., 917 F.2d 100 (2d Cir.1990) 9

TABLE OF AUTHORITIES
(continued)

Page

Jock v. Sterling Jewelers, Inc., 25 F. Supp. 2d 444 (S.D.N.Y. 2010)...9

Joseph Victori Wines, Inc. v. Vina Santa Carolina S.A., 933 F. Supp. 347 (S.D.N.Y. 1996) 9

Law Enforcement Sys., Inc. v. Am. Express Co., No. 03-Civ.-3371, 2006 WL 2034435 (E.D.N.Y. July 17, 2006) 4, 9

Lopez v. Consol. Edison Co. of N.Y., 4357 N.E.2d 951 (N.Y. 1976) 8

Martens v. Smith Barney, Inc., No. 96-Civ.-3779 (S.D.N.Y. filed May 20, 1996) 10

Mitchell v. Metro. Life Ins. Co., Civ. No 01 -2112 (S.D.N.Y. filed Mar. 13, 2001) 10

Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425 (2d Cir. 1992)......................................8

Shain v. Ctr. for Jewish History, 2006 WL 3549318 (S.D.N.Y. Dec.7, 2006).............................11

Silverman v. Riker-Maxson Corp., 456 N.Y.S.2d 775 (App. Div. 1982) 7

Smith & Wollensky Rest. Group v. Passow, Civ. No. 10-Civ.-11498 (D. Mass. Jan. 18, 2011) 5, 6

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010).................. passim

Trilegiant Corp. v. Sitel Corp., No. 09-Civ.-6492, --- F.R.D. ----, 2010 WL 4668950 (S.D.N.Y. Nov. 15, 2010) 3, 4, 12

Winston v. Mezzanine Invs., L.P., 648 N.Y.S.2d 493 (Sup. Ct. 1996)..9

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

Fed. R. Civ. P. 26(b)(1)...3, 9

Fed. R. Civ. P. 26(b)(2)(C) 12

OTHER AUTHORITIES

Benson v. CSA-Credit Solutions of Am., Inc., Case No. 11-160-M-02281-08 (July 6, 2010) 5, 6

Nancy Levit, "*Megacases, Diversity, and Elusive Goal of Workplace Reform*," 49 B.C. L. Rev. 367, 374 -375 (2008) 10

TABLE OF AUTHORITIES
(continued)

Page

Passow v. Smith & Wollensky Rest. Group, Inc., AAA No. 11 160 00357 08 (July 28, 2010) 5, 6

World English Dictionary, http://dictionary.reference.com/browse/your 7

I. PRELIMINARY STATEMENT

Plaintiffs move to compel discovery of a targeted number of documents that are relevant to opposing Defendants' Motion to Stay Plaintiff Lisa Parisi's Claims and Compel Individual Arbitration (the "Motion to Compel Arbitration"). In support of their motion to compel arbitration of individual claims, Defendants rely on Parisi's November 2003 Managing Director's Agreement (the "Agreement"). Because the Agreement itself is ambiguous as to the treatment of Parisi's class claims under New York law, extrinsic evidence of the type Plaintiffs seek here is relevant to resolving the ambiguities in the Agreement and to determining the intent of the parties under the analysis set forth in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).

II. PROCEDURAL BACKGROUND

On September 15, 2010, Plaintiffs filed a class action complaint in the United States District Court for the Southern District of New York alleging individual and class-wide gender discrimination at Goldman Sachs. On November 22, 2010, Defendants answered the Complaint and filed the Motion to Compel Arbitration. In response to Defendants' motion and in order to prepare their opposition, Plaintiffs propounded targeted discovery. After the parties were unable to reach agreement through the meet and confer process regarding the scope of Plaintiffs' discovery requests, Plaintiffs sought the assistance of the Court. The Court held a pre-motion conference on January 14, 2011, and ordered that the parties fully brief the issue.

III. FACTUAL BACKGROUND

The Agreement

In November 2003, Parisi was promoted to Managing Director. As a condition of her promotion, she signed an employment letter that contained an arbitration provision. *See*

Declaration of Adam T. Klein ("Klein Dec."), Ex. A (Nov. 2003 Employment Agreement). The Agreement contains a New York choice of law clause. *Id.* at Section 5, p. 7.

The Agreement, written in its entirety by the Goldman Sachs Group, Inc., states:

> [A]ny dispute , controversy or claim arising out of or based upon or relating to Employment Related Matters will be finally settled by arbitration in New York City before, and in accordance with the rules then obtaining of, the New York Stock Exchange, Inc. ("*NYSE*") or if the matter is not arbitrable before the NYSE, the National Association of Securities Dealers ("*NASD*"). If both the NYSE and the NASD decline to arbitrate the matter, the matter will be arbitrated before the American Arbitration Association ("*AAA*") in accordance with the commercial arbitration rules of the AAA. You agree that any arbitration decision and/or award will be final and binding upon the parties and may be entered as a judgment in any appropriate court.

Id. at Section 4, p. 6

"Employment Related Matters" are defined in Section 3 of the Agreement as those "matters arising out of or relating to or concerning this Agreement, your hire by or employment with the Firm or the termination thereof, or otherwise concerning any rights, obligations or other aspects of your employment relationship in respect of the Firm." *Id.* at Section 3, p. 5. This definition does not specify whether class actions, including systemic challenges to pattern-or-practice gender discrimination, are within its scope.

The agreement contemplates that some matters will not be arbitrated and provides that those matters are subject to federal jurisdiction in New York:

> The parties to this agreement hereby irrevocably submit to the exclusive jurisdiction of any state or federal court located in the city of New York over **any suit, action or proceeding arising out of relating to employment related matters (as defined herein) which is not otherwise arbitrated** or resolved according to the provisions of Section 4 of this Agreement.

Id., at Section 5, p. 6 (emphasis added).

Because the language of the Agreement does not specifically mention class claims, it is susceptible to only one of two reasonable interpretations: (1) that the Agreement excludes class claims from arbitration, and such claims must therefore be filed in court; or (2) that it covers class claims, and such claims must be brought only in arbitration. Goldman Sachs urges yet a third, extreme interpretation: that class claims may never be brought in any forum. Discovery is necessary to resolve the intent of the parties on this critical issue.

Requested Discovery

Plaintiffs have propounded focused discovery related to Goldman Sachs' custom and practice in regards to arbitration claims. Goldman Sachs has objected to the following discovery:[1] representative exemplars from 2001, 2002, 2003, 2004, 2005, and 2006 of (1) any cardholder agreements for Goldman Sachs-sponsored, -branded, or -marketed credit cards; and (2) any agreements employees must sign in connection with the selection or purchase of Goldman Sachs investment products made available to Goldman Sachs employees, including but not limited to brokerage accounts or private wealth management services. Defendants object to producing the documents based on relevance.

IV. **ARGUMENT**

Plaintiffs readily meet the standards for production under Federal Rule of Civil Procedure 26 and governing case law; the information Plaintiffs seek is relevant to their opposition to the Motion to Compel Arbitration. *See* Fed. R. Civ. P. 26(b)(1); *see also Trilegiant Corp. v. Sitel Corp.*, No. 09-Civ.-6492, --- F.R.D. ----, 2010 WL 4668950, at *2 (S.D.N.Y. Nov. 15, 2010) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept.") (internal citations omitted). Specifically, the discovery Plaintiffs seek – credit card and investment product agreements – are relevant to interpreting the Agreement and establishing the intent of the parties in regards to the treatment of Parisi's class claims. *See, e.g.*, *Berger v.*

[1] Plaintiffs have sought additional, limited documents related to the Motion to Compel Arbitration, to which Defendants have produced limited documents in response.

Cantor Fitzgerald Sec., 942 F. Supp. 963, 967 (S.D.N.Y. 1996) (denying motion to compel arbitration and stay proceedings pending the outcome of discovery related to whether agreement to arbitrate had been made); *Law Enforcement Sys., Inc. v. Am. Express Co.*, No. 03-Civ.-3371, 2006 WL 2034435, at *1 (E.D.N.Y. July 17, 2006) (affirming order granting motion to compel discovery where "discovery at issue is relevant to plaintiffs' defenses against a motion to compel arbitration."). "Once relevance has been shown, it is up to the responding party to justify curtailing discovery." *Trilegiant Corp.*, 2010 WL 4668950, at *2.

A. The Discovery Plaintiffs Seek Is Necessary In Order To Undertake The Analysis Outlined By The Supreme Court In *Stolt-Nielsen*

Fundamental to the question of whether the discovery is relevant is the Supreme Court's recent decision in *Stolt-Nielsen*. In that case, the Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1775 (emphasis in original). The Court acknowledged that under the limited circumstances of that case, it had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n. 10. Accordingly, the Court did not hold, as Defendants suggest, that an agreement must expressly authorize class arbitration; the Court held only that – under the relevant, governing law – there must be a contractual basis for finding an agreement to arbitrate classwide. Thus, while "mere silence" cannot constitute proof of an agreement to class arbitration, neither does the absence of a class arbitration provision negate such an agreement. The Court's holding in *Stolt-Nielsen* does not require an express provision for allowing class arbitration; had the Supreme Court intended to impose such a "plain language" rule, it would have said so explicitly.

Instead, the parties' intent regarding class claims must be ascertained through the circumstances of their relationship. As the Court noted, the parties in *Stolt-Nielsen* were sophisticated business entities involved in a maritime contract that had no industry "tradition" for class litigation. *Id.* at 1775. Here, in contrast, the parties are a corporate powerhouse on the one hand, and its employee on the other, litigating Title VII claims with a history of class action enforcement. Moreover, unlike here, the parties in *Stolt-Nielsen* expressly stipulated that there was no agreement relating to class treatment of claims. *See id.* at1766. Therefore, under those fact-specific circumstances, the Court held that it was unreasonable for the arbitrator to read an intent to arbitrate class claim when the parties had expressly stipulated to the contrary.

Arbitrators and courts applying *Stolt-Nielsen* have agreed that it is the intent that controls; the parties are not required to state an express agreement in order to authorize class arbitration. *See Benson v. CSA-Credit Solutions of Am., Inc.*, Case No. 11-160-M-02281-08 (July 6, 2010) (attached as Klein Dec., Ex. B) (finding an agreement to arbitrate even in the absence of an express provision within the contract); *Passow v. Smith & Wollensky Rest. Group, Inc.*, AAA No. 11 160 00357 08 (July 28, 2010) (attached as Klein Dec., Ex. C) (same); *Smith & Wollensky Rest. Group v. Passow*, Civ. No. 10-Civ.-11498 (D. Mass. Jan. 18, 2011) (attached as Klein Dec., Ex. D) (upholding the arbitrator's decision in *Passow*, AAA No. 11 160 00357 08); *Galakhova v. Hooters of Am. Inc.*, Case No. 34-2010-00073111 (Cal. Super. Ct. July 27, 2010) (attached as Klein Dec., Ex. E) (finding an agreement to arbitrate class claims even in the absence of an express provision within the contract). The discovery Plaintiffs seek is relevant to establishing whether the parties agreed to arbitrate class claims, submit them to the court, or waive the claims.

B. The Agreement Is Ambiguous As To The Treatment Of Class Claims

The Agreement is ambiguous as to class claims because it reasonably can be interpreted in more than way. *See Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230 (2d Cir. 2008) (an agreement is ambiguous when it is capable of more than a single meaning "when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.") (internal citations omitted). As described above, the Agreement is susceptible to two reasonable interpretations – that class claims are either allowed in arbitration or in litigation – with Goldman urging yet a third interpretation, that all class claims are waived.

The language of the Agreement, which states that "any dispute, controversy or claim arising out of or based upon or relating to Employment Related Matters will be finally settled by arbitration," Klein Dec., Ex. A, at Section 4, p. 6, may support a finding that the parties intended to arbitrate class claims.[2] Employment Related Matters are defined as those "arising out of or relating to or concerning this Agreement, your hire by or employment with the Firm or the termination thereof, or otherwise concerning any rights, obligations or other aspects of your employment relationship in respect of the Firm." *Id.* at Section 3, p. 5.

---

[2] Courts and arbitrators considering agreements with similar language have concluded that such broad language authorizes the arbitration of class claims. *See, e.g.*, *Benson*, Case No. 11-160-M-02281-08, at *6 (Ex. B) (finding an agreement to arbitrate class claims based on a definition of arbitrable matters as "any dispute or claim relating to or arising out of the employment relationship"); *Passow*, AAA No. 11 160 00357 08, at *2 (Ex. C) (finding an agreement to arbitrate class claims based on a definition of arbitrable matters as "any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state and federal law" language); *Smith & Wollensky Group v. Passow*, Civ. No. 10-cv-11498, at *2 (Ex. D) (same); *Galakhova*, Case No. 34-2010-00073111 (Ex. E) (finding an agreement to arbitrate class claims based on a definition of arbitrable matters as "all Claims," including but not "limited to, any claim whether arising under federal, state, or local law"). This fact alone is determinative of the question of whether the agreement is ambiguous on its face as to class claims.

While Defendants argue in their Motion to Compel Arbitration that use of the word "your" limits Employment Related Matters to individual issues[3], the argument is unpersuasive. The word "your" can be defined as either the singular or plural possessive. *See* World English Dictionary, http://dictionary.reference.com/browse/your ("belonging to or associated with an unspecified person or people in general") (last visited January 2, 2011). This ambiguity must be construed against Goldman Sachs as the drafter of the Agreement. *See Guardian Life Ins. Co. of Am., Inc. v. Schaefer*, 519 N.E.2d 288, 290 (N.Y. 1987); *67 Wall St. Co. v. Franklin Nat'l. Bank,* 333 N.E.2d 184, 187 (N.Y. 1975).

However, if the Agreement does not provide for arbitration of class claims, then the Agreement must be interpreted to allow Parisi's class claims to be brought in federal court. While Section 4 provides that all employment-related matters are subject to mandatory arbitration, Section 5 expressly provides that any suit, action, or proceeding that is not subject to arbitration under Section 4 shall be submitted to the jurisdiction of the state and federal courts of New York. *See* Klein Dec., Ex. A, at Sections 4, 5, p. 6-7. On its face, Section 5 anticipates that some matters will proceed outside arbitration and be brought in court.

Defendants' argument that silence as to class actions means that they have been completely waived has no support in equity, law, or common sense.

C. New York Contract Law Allows For The Consideration Of Extrinsic Evidence In Interpreting A Contract

The parties contracted for the Agreement to be governed by New York law. *See* Klein Dec., Ex. A, at Section 5, p. 7. It is well settled under New York law that "[p]arol evidence is admissible to supply omissions or explain ambiguities" in an agreement. *See Silverman v. Riker-*

---

[3] *See* Memorandum of Law In Support of Defendants' Motion to Stay Plaintiff Parisi's Claims and Compel Individual Arbitration, Docket No. 24, p. 8.

Maxson Corp., 456 N.Y.S.2d 775, 776 (App. Div. 1982); *see also Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 426 (2d Cir. 1992) (where contractual language "creates an ambiguity, a reviewing court must permit the receipt of evidence in order to see what was in the drafters' minds."); *Fernandez v. Price*, 880 N.Y.S.2d 169, 173 (App. Div. 2009); *Alexander & Alexander Servs., Inc. v. Certain Underwriters at Lloyd's*, 136 F.3d 82, 86 (2d Cir. 1998) (applying New York law) ("[T]he court may accept *any available extrinsic evidence* to ascertain the meaning intended by the parties during the formation of the contract" (emphasis added)); *see also Stolt-Nielsen*, 130 S. Ct. at 1769 n. 6. (*citing, e.g., Lopez v. Consol. Edison Co. of N.Y.*, 4357 N.E.2d 951, 954-955 (N.Y. 1976) (where contract terms were ambiguous, parol evidence of custom and practice was properly admitted to show parties' intent). Moreover, under New York law, courts adopt an interpretation of the contract that "give[s] fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized." *Fernandez v. Price*, 880 N.Y.S.2d 169, 172 (App. Div. 2009).[4]

The extrinsic evidence sought here will demonstrate that Goldman's failure to explicitly exclude class claims in the Agreement reflects Goldman's decision to permit class claims in litigation or arbitration. Plaintiffs expect that the requested documents will reflect Goldman's express exclusion of class claims in certain contexts where, unlike here, Goldman intended that they be excluded. Such evidence regarding the intent of the parties is consistent with the Supreme Court's recent decision in *Stolt-Nielsen*.

---

[4] The fact that this dispute relates to the arbitrability of class claims does not alter the application of relevant contract law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts").

Furthermore, the Court may consider extrinsic evidence because the Agreement is not a fully-integrated document. An integrated agreement is one that "represents the entire understanding of the parties to the transaction." *Investors Ins. Co. v. Dorinco Reins. Co*., 917 F.2d 100, 104 (2d Cir.1990). As the Agreement refers expressly to prior agreements, an Employee Handbook, and undefined "Firm policies and guidelines" – not even limited to written or official policies – it is self-evident that the Agreement is not a complete statement of the employment contract. Thus, under New York law, evidence of additional terms may be found beyond the written terms of the agreement. *See Joseph Victori Wines, Inc. v. Vina Santa Carolina S.A*., 933 F. Supp. 347, 352 (S.D.N.Y. 1996) (extrinsic evidence of other terms may be admitted to complete the contract, provided that it does not contradict the written terms).

D. The Requested Discovery Is Necessary To Demonstrate The Knowledge, Custom, Expectations, And Traditions Of The Parties

The documents Plaintiffs seek are directly relevant to the parties' intent; they demonstrate Defendants' knowledge, custom, expectations, and tradition of treating class claims. *See, e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1769 n.6; *Jock v. Sterling Jewelers, Inc.*, 25 F. Supp. 2d 444, 450 (S.D.N.Y. 2010) (court may consider "contextual factors" in resolving ambiguities, including "any pertinent tradition of dispute resolution"); *Winston v. Mezzanine Invs., L.P.*, 648 N.Y.S.2d 493, 499 (Sup. Ct. 1996) (evidence relating to "the purpose or object of the contract, or of a specific provision of the contract . . . and of the industry custom and usage, . . . is admissible to explain an ambiguity") (internal citations omitted); *see also* Fed. R. Civ. P. 26(b)(1); *Berger*, 942 F. Supp. at 967; *Law Enforcement Sys.*, 2006 WL 2034435, at *1.

For example, if Defendants specifically excluded class arbitration in some contexts, but not others, Defendants' failure to do so in this Agreement could demonstrate that they intended to permit class litigation or arbitration in the Agreement. Similarly, changes over time in the arbitration clauses of other types of agreements demonstrate Defendants knowledge and intent as to treatment of class claims.

The discovery also takes on added significance when viewing the Agreement in its historical context. As of 2003, the time when the Agreement was signed, class actions were a regular and anticipated means of resolving employment discrimination claims. *See* Nancy Levit, "*Megacases, Diversity, and Elusive Goal of Workplace Reform*," 49 B.C. L. Rev. 367, 374 - 375 (2008) ("By the mid- to late 1990s, courts began to certify [employment discrimination] classes with increasing frequency."). In fact, employment class actions challenging systemic gender discrimination in the financial services industry were widespread in the years leading up to 2003, and after that time. *See, e.g., Martens v. Smith Barney, Inc.*, No. 96-Civ.-3779 (S.D.N.Y. filed May 20, 1996); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 96 Civ. 3773 (N.D. Ill. filed June 21, 1996); *Mitchell v. Metro. Life Ins. Co.*, Civ. No 01 -2112 (S.D.N.Y. filed Mar. 13, 2001); *E.E.O.C. v. Morgan Stanley & Co.*, No. 01-Civ.-8421 (S.D.N.Y. filed Sept. 10, 2001); *see also Amochaev v. Citigroup Global Mkts., Inc.*, No. 05-Civ.-1298 (N.D. Cal. filed Mar. 31, 2005); *Augst-Johnson v. Morgan Stanley & Co., Inc.*, No. 06-Civ.-1142 (D.D.C. filed June 22, 2006). Clearly, the relevant industry custom for allegations of company-wide patterns of discrimination was and is to bring class actions in federal court.

Relevant industry customs also highlight the significance of the discovery sought. On October 8, 2003, one month before Plaintiff Parisi signed this Agreement, the American Arbitration Association ("AAA") adopted rules for the arbitration of class claims – reflecting an expectation that such claims are arbitrable. This was done, in part, as a response to the Supreme Court's June 2003 decision in *Bazzle v. Green Tree Financial Corp.*, 539 U.S. 444 (2003), which addressed the arbitrability of class claims. The fact that the AAA adopted class arbitration rules shortly before Plaintiff Parisi signed this Agreement is significant. In 2003, neither the NYSE or the NASD provided for the arbitration of class claims, but the Agreement provided, "[i]f both the NYSE and the NASD decline to arbitrate the matter, the matter will be arbitrated before the American Arbitration Association ("AAA")."

Furthermore, to the extent that Goldman asserts that the Agreement can be interpreted as a waiver of class claims, the discovery Plaintiffs seek relates to whether the waiver was knowing and voluntary. Substantive rights afforded under federal law cannot be waived unless the waiver is knowing and voluntary, and courts considering the issue look to the totality of the circumstances.[5] *See Shain v. Ctr. for Jewish History*, 2006 WL 3549318, at *3 (S.D.N.Y. Dec.7, 2006) ("A plaintiff may waive a statutory claim for discrimination as long as it is done knowingly and voluntarily . . . a totality of circumstances test is used to determine if a waiver of a Title VII claim was knowing and voluntary.") (internal citations omitted); *Cardwell v. Thermo Fischer Scientific*, No. 09 Civ. 7809 (DAB), 2010 WL 3825711, at *5 (S.D.N.Y. Sept. 23, 2010) (same). The discovery also relates to whether the waiver of the New York state discrimination class claims was clear, unambiguous, and knowingly and voluntarily entered into, as required by New York law. *See Cardwell*, 2010 WL 3825711, at *3; *Shain*, 2006 WL 3549318, at *6.

To the extent that the documents demonstrate that Goldman Sachs knew how to draft a class waiver but did not do so, it indicates that the parties did not intend for there to be a waiver of class claims, especially in light of the substantive rights being waived. Furthermore,

---

[5] Class actions afford plaintiffs substantive rights and remedies that individual actions do not. *See, e.g.*, *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 179 (3d Cir. 2009) (recognizing the "distinction between an individual claim of discrimination adjudicated . . . , where the focus is on uncovering the reason for a particular employment decision, and a class-based pattern-or-practice claim . . . , which focuses at the "liability" stage not on individual hiring decisions, but on a pattern of discriminatory decisionmaking.") (internal citations and quotation marks omitted); *Guzman v. N. Ill. Gas Co.*, No. 09-Civ.-1358, 2009 WL 3762202, at *4 (N.D. Ill. Nov. 6, 2009) (noting "the unique nature of [Title VII] pattern-or-practice claims").

Goldman's failure to include a class waiver in the Agreement when it knew how to do so (as seen by its use of class waivers in other contexts), suggests that it intended not to waive class claims within the Agreement.

E. The Production Of Documents Is Not Unduly Burdensome

Because the discovery Plaintiffs seek is highly relevant, Defendants may avoid production only by articulating grounds for limiting discovery under Federal Rule of Civil Procedure 26(b)(2)(C), which they cannot do. "Generally speaking, discovery is limited only when 'sought in bad faith, to harass or oppress the party subject to it, when it is irrelevant, or when the examination is on matters protected by a recognized privilege.'" *Trilegiant*, 2010 WL 4668950 at *3 (quoting *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992)). None of these grounds exist here.

As outlined above, the discovery Plaintiffs seek – exemplars of Goldman Sachs own agreements – is relevant to the interpretation of this Agreement, poses minimal burden, and is discoverable.[6] *See id.* (addressing the parties' disagreement as to whether a fine provision was a liquidated damages provision and noting that "anything that might further the interpretation of that provision . . . is relevant and subject to discovery").

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court order Defendants to produce representative exemplars from 2001, 2002, 2003, 2004, 2005, and 2006 of (1) any cardholder agreements for Goldman Sachs-sponsored, -branded, or -marketed credit cards; and (2) any agreements employees must sign in connection with the selection or purchase

[6] Nor do the requests pose privacy concerns in light of the Parties' agreement to treat any discovery as Attorneys' Eyes Only pending the execution of a comprehensive Protective Order.

of Goldman Sachs investment products made available to Goldman Sachs employees, including but not limited to brokerage accounts or private wealth management services.

Dated: January 21, 2011
New York, New York

By: /s/ Adam T. Klein

Outten & Golden LLP
Adam T. Klein
Cara E. Green
Jennifer L. Liu
Mariko Hirose
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000

Lieff, Cabraser, Heimann & Bernstein, LLP
Kelly M. Dermody (admitted *pro hac vice*)
Anne B. Shaver (admitted *pro hac vice*)
Heather H. Wong (admitted *pro hac vice*)
Alison M. Stocking (admitted *pro hac vice*)
275 Battery Street, 29th Floor
San Francisco, California 94111-3339
Telephone: (415) 956-1000

Attorneys for Plaintiffs and the Putative Class